

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

In the Matter of)
) 83-CET-13
TENNESSEE INDIAN COUNCIL, INC.)
_____)

REMAND ORDER

Preliminary Statement

This proceeding arose under the Comprehensive Employment and Training Act, as amended ("Act" or "CETA"), 29 U.S.C. 801 et seq., and the regulations issued thereunder and in effect at the appropriate times ("Regulations"), 20 CFR Parts 675 through 689. On February 9, 1983, in response to a request by the Grant Officer herein, I issued an Order asserting jurisdiction in this matter, and staying and vacating the Administrative Law Judge's ("ALJ's") January 10, 1983, Decision and Order pending a final determination. Subsequently a Notice of Briefing Schedule was issued to the Grant Officer and to Tennessee Indian Council, Inc. ("TIC"), and briefs were tendered by them.&/

Discussion

For several years -- most recently Fiscal Year ("FY") 1981 -- TIC was a CETA Native American Program grantee in Tennessee under Title III of the Act. On September 30, 1981, pursuant to the Regulations at 20 CFR 676.88(e), the Grant Officer issued a Final Determination, denying TIC's application for a Native American Program grant for FY 1982 (DOL Exhibit 1. tab B). TIC appealed from that to the U.S. Department of Labor ("USDOL") Office of Administrative Law Judges ("OALJ"); and, on August 31, 1982, following a hearing, the Deputy Chief ALJ issued a Decision and Order ordering designation of TIC as Native American grantee in Tennessee for FY 1982 (DOL Ex. 2, tab 10). In his explanation of that order, the ALJ noted (id., at 6) the Grant Officer's ruling that TIC lacked the capability to administer an Indian and Native American employment and training

1/ The Grant Officer's May 6, 1983 motion to file a brief in response to TIC's reply brief is denied, on the ground that such a Grant Officer brief is not provided for in the Notice of Briefing Schedule and that its acceptance for filing is not otherwise warranted.

program as evidenced by (i) TIC's failure to submit timely and accurate reports, (ii) its deficient financial management system, (iii) its failure to resolve audit findings and recommendations, and (iv) its deficient travel-cost-management system. The ALJ acknowledged that, "if the only factor to be considered in the designation of Native American grantees was the condition of the applicant's financial management system and recordkeeping, then -- clearly -- TIC was properly denied designation." Id. However, the ALJ continued, the Regulations at 20 CFR 688.10(b) require that --

"To be designated as a Native American grantee, an applicant must have:

"(3) The capability to administer an Indian and Native American employment and training program. For purposes of this paragraph, 'capability to administer' means that the applicant can demonstrate that it possesses or can acquire the managerial, technical, or administrative staff with the ability to properly administer government funds, develop employment and training positions, evaluate program performance, and comply with the provisions of the Act and the regulations. In judging the applicant's request for designation, consideration shall be given to factors such as:

"(i) Previous experience in operating an effective employment and training program serving Indian or Native Americans;

"(ii) The number and kind of activities of a similar magnitude and complexity that the applicant has successfully completed; and

"(iii) The identification of staff currently or potentially in the employ of the applicant who have the qualifications to carry out the managerial, technical, or administrative tasks involved in carrying out activities under the Act." Id.

He found that the Grant Officer had "overemphas[ized] . . . inaccurate reporting[,] with little or no consideration to TIC's program activity" (id., at 7); that, "In fact, the record shows that TIC "had **extensive** experience for the [previous] four years operating an employment and training program serving Indians and Native Americans"; that "The record is void of any allegations that would indicate that TIC did not use these funds effectively," and indeed shows "that TIC was using its Title III funds as efficiently as possible under the existing circumstances." Id. at 10. He cited hearing testimony that TIC's placement **rate** was over 90 percent, and that in FY 1981, it placed 27 out of 30 people. Id. In the light of this and other evidence which, he said, the Grant Officer had given

little or no consideration, the ALJ concluded that TIC should have been designated as a Native American grantee for FY 1982. Id., at 11.

That decision, however, did not become final until after the expiration of FY 1982. During that fiscal year, Tennessee's CETA Native American Program had been conducted by United South and Eastern Tribes ("USET"), an organization, normally serving other sections of the country, which had been brought in to Tennessee by the Grant Officer to fill the program-administration void created by the dispute over TIC's eligibility.

During the course of FY 1982, both TIC and USET filed applications for designation as FY 1983 Native American Program grantee in Tennessee. The Grant Officer denied TIC's application for an FY 1983 grant to operate a Native American Program in Tennessee, and granted USET's application for such a grant instead. That decision appears to have been made largely on the basis of (1) the fact that USET had been the incumbent grantee during FY 1982 (notwithstanding the ALJ's belated Decision and Order) and was believed by appropriate USDOL Employment and Training Administration ("ETA") personnel to have performed satisfactorily, (2) the Grant Officer's negative ruling on TIC's FY 1982 application (and the evidence on which the Grant Officer had based that determination), (3) an unacceptably scanty evaluation by ETA personnel of (a) TIC's qualifications other than those which had dominated the Grant Officer's evaluation of TIC's FY 1982 eligibility, and of (b) TIC's qualifications as compared with those of USET, and (4) a senior level ETA official's belief, based on misunderstanding and hearsay, that TIC's corporate charter had been revoked by the State of Tennessee. The two applications were essentially competitive, since a grant of either one of them realistically precluded a grant of the other.^{2/}

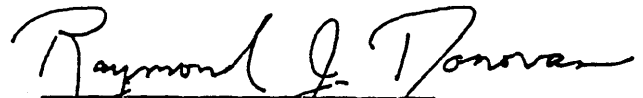
Again, TIC appealed to the OALJ, and again the Deputy Chief ALJ ruled, after a hearing, that TIC must be designated as a CETA Native American Program grantee for Tennessee, in FY 1983. However, notwithstanding USET's vital interest in the outcome of that proceeding, the ALJ did not notify USET of the hearing, or treat it as a party to the proceeding at any stage. Nor did he undertake any comparative evaluation

^{2/} See the Grant Officer's October 29, 1982 letter to the executive director of TIC (DOL Ex. 2, tab 9), in which TIC is told, "Both your organization and the United South and Eastern Tribes ... applied ... for the same geographic areas. More than one eligible applicant may apply to be designated as a Native American CETA grantee to serve a given geographic area pursuant to 20 CFR 688.11, but only one is selected ... CETA regulations require the grantee designation process to be conducted annually for each new fiscal year" (emphasis supplied).

of the qualifications of TIC and USET. Essentially, he based his FY 1983 determination in favor of TIC on the ground that his August 31, 1982, Decision and Order regarding TIC's FY 1982-grant qualifications was res judicata with respect to TIC's FY 1983 eligibility since ETA personnel had considered no newly available information in denying TIC's FY 1983 application. In so ruling, the ALJ was clearly in error because of his failure (1) to include USET as a party to the proceeding, and (2) to comparatively evaluate TIC's and USET's qualifications.^{3/}

Order

Accordingly, it is Ordered that this matter IS REMANDED to the Office of Administrative Law Judges for further expedited proceedings in which United South and Eastern Tribes shall be accorded a full opportunity to serve as a party, and to present evidence and argument on its own behalf, and in which the qualifications of Tennessee Indian Council and United South and Eastern Tribes for FY 1983 Native American Program grantee in Tennessee shall be comparatively considered by the Administrative Law Judge.


Secretary of Labor

Dated: July 13, 1983
Washington, D.C.

^{3/} Section 121(o) of the Act provides that "[n]o funds provided under this Act shall be paid to any non-governmental organization, association, firm, or other entity for the conduct of any program or activity. (other than title VII or on-the-job training) under this Act unless .. (2) such organization, association, firm or other entity is selected on the basis of merit ..." (emphasis supplied). Clearly, where two or more applicants have filed mutually exclusive applications for a grant to provide essentially similar services to the same population in the same area, the requirement of "select[ion] on the basis of merit" means that the merits of the applications shall be compared, and that the most meritorious applicant shall be selected.

CERTIFICATE OF SERVICE

Case Name: Tennessee Indian Council, Inc.
Case No.: 83 -CET-13
Document: Remand Order by Secretary of Labor

The above-referenced document was mailed to the persons listed
below on July 13, 1983.

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